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Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

SUSAN BALDWIN,

Petitioner,

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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August 28, 2007

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QUESTIONS PRESENTED

Whether summary judgment, interpreting all reasonable inferences to the non-moving party, was properly granted which includes the following questions:

1. Whether there was actionable sexual harassment where in addition to the sexual harassment directed at the sole woman, the harasser also allegedly made disparaging remarks to the eight other men employed.

2. Whether the employer the satisfies *the Ellerth/Faragher* affirmative defense, *i.e*, "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided," *Burlington Industries v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998)*; Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998), by offering the victim the following options: psychological counseling with the alleged harasser, a transfer to a completely new city for a largely commissioned based sales job, or termination if she does not resign.

3. Whether the Eleventh Circuit erred in determining, contrary to the time period permitted in the Fifth Circuit, that by waiting just over three months to file an internal complaint of sexual harassment (and 38 days after being instructed by her manager- "Don't you ever fucking go over my head. You'll fucking losing your job...") Baldwin was "unreasonable" as a matter of law and thus failed to take advantage of any preventative or corrective opportunities.

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. Rule 14.1(b) the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

The Petitioner here and the appellant below is Susan Baldwin.

The Respondent here and appellee below is Blue Cross and Blue Shield of Alabama.

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INTRODUCTION

The decision below has attracted the attention of employment lawyers and expands the scope of the affirmative defense to extinguish valid Title VII claims from consideration by juries and as one commentator noted, "is much more than a blow to a single plaintiff in a single case".[1]

Although the decision below was only issued in March and the petition for re-hearing or hearing en banc was denied on May 30, 2007, the decision has been cited numerous times to dismiss cases on summary judgment and to reverse a jury decision.[2]

An employee who files an internal complaint of sexual harassment within the 180 day time period allowed to file an EEOC charge in a non-deferral state is, depending on what circuit they live in, now faced with mandatory summary judgment for failing to promptly complain of alleged sexual harassment.

Baldwin, a citizen of the State of Alabama, waited 38 days from a blow up with her supervisor and just over three

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[1] Joanna Grossman, The U.S. Court of Appeals For the Eleventh Circuit Undercuts Sexual Harassment Victims' Rights, http://writ.news.findlaw.com/grossman/20070403.html

[2] *Nurse "Be" v. Columbia Palms West Hosp. Ltd. Partnership*, __ F.3d __ 2007 WL 1953580, at *5 (11th. Cir. (Fla.) 2007); *Minix v. Jeld-Wen, Inc.* 2007 WL 1828259 (11th Cir. 2007); *Smith v. America Online, Inc.*, 2007 WL 1549419 (M.D. Fla May 2007); *Carter v. University of South Alabama Children & Women's Hosp.*, 2007 WL 951739 (S.D. Ala 2007).

months after demands for sex before making her internal complaints.

However, if Baldwin worked in neighboring Mississippi, she would have survived the affirmative defense with respect to reporting harassment. *See Watts v. Kroger*, 170 F.3d 505, 509 (5th Cir. 1999) (A jury could find that an employee who waited over a year until sexual harassment intensified and then waited from spring until July was not unreasonable as a matter of law.) The Ninth Circuit has determined that waiting nineteen days to report harassment is not per se unreasonable as to require summary judgment. *See Craig v. M&O Agencies, Inc.* __ F.3d __, 2007 WL 2264635 (9th Cir. 2007).

Two terms ago – *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 152, 124 S. Ct. 2342, 2357 (2004) – this Court provided the following supplemental guidance to district courts in assessing the affirmative defense:

> Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. See *supra*, at 2354. The plaintiff might elect to allege facts relevant to mitigation in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

Dismissing sexual harassment complaints on summary judgment for failure to timely report sexually harassing behavior transforms the second prong of the *Ellerth/Faragher* affirmative defense to a statute of limitations eliminating the right to a jury trial.

As other circuits allow different times for reporting harassment for purposes of the affirmative defense, further guidance is needed on the burdens of proof associated with the affirmative defense at summary judgment.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007) and is reprinted in Appendix B to the Petition. (App. p. 3a) The District Court's opinion is not reported but is attached as Appendix C. (App. p. 39a)

JURISDICTION

The Court of Appeals for the Eleventh Circuit issued its opinion on March 19, 2007. (App. p. 3a) The Court of Appeals denied the petition for rehearing or rehearing en banc on May 30, 2007. (Appendix A, App. p. 1a) This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISION

The relevant statutory provision is The Civil Rights Act of 1964, §701 *et seq.* as amended 42 U.S.C.A. §2000e *et seq.*

STATEMENT OF THE CASE

A. Factual Background

Plaintiff, Susan Baldwin, a twelve year Blue Cross employee and the only female marketing representative out of nine representatives in Huntsville, Alabama, was terminated shortly after filing an internal complaint for sexual

harassment. Baldwin consistently ranked as a top performer in the number of contracts sold statewide. On November 8, 2001, Emma Barclay, a Human Resource representative spoke with Baldwin and received her written complaint. In receiving the complaint, Barclay noted in writing that, "she [Baldwin] is afraid of losing her job and that her family depends on her finances."

Baldwin's allegations concerned Scott Head, her direct supervisor. Baldwin was the only female representative out of nine marketing representatives in Huntsville, Alabama. Baldwin claims that Head's harassment included sexual propositions such as, "hey, babe blow me" and a request that she spend the night in his hotel room after a company dinner.

Head also allegedly subjected Baldwin to an almost continuous barrage of obscene language and gestures: (1) Head regularly used the word "fuck" or "fucking"around the office; (2) Head regularly used the word "cocksucker" around the office; (3) Head regularly used the word "peckerwood" around the office; (4) Head used the terms "motherfucker" and "bullshit" on numerous occasions;(5) referred to women as "sluts", "tramps" and "bitches" on a regular basis; (6) on a couple of occasions, Head approached Baldwin and played with his pants zipper in front of her saying "hey babe, hey babe"; (7) on two or three occasions Head came up behind Baldwin close enough so that she could feel his breath on her neck and said "Hey Babe"; (8) Head also informed Baldwin that he wanted hire a guy for the job "somebody who has balls like you do"; (9) Head thrust his pelvis towards [plaintiff] so forcefully that she was knocked onto his couch and then demanded oral sex by saying, "hey babe blow me"; (10) Head propositioned [plaintiff] for sex at BCBS banquet honoring top sales people; (11) after [plaintiff] declined Head's request for oral sex, Head graphically described how

he choked his wife, whom he described as a "fucking bitch", during a fight; (12) Head encouraged sexually inappropriate banter among his subordinates by regularly joking with them about sleeping with their wives; (13) Head created an atmosphere where male employees felt comfortable playing with their penis[es] in front of female employees; and (14) Head used the word "babe" when referring to women incessantly. *See* Pet. App. 61a-62a; *Baldwin v. Blue Cross Blue Shield*, 480 F.3d 1287, 1294-95 (11th Cir. 2007).

After leading an investigation that did not include speaking with Baldwin, Rick King, Senior Vice President and Compliance Officer, proposed joint counseling for Baldwin and Head to be conducted by industrial psychologist Dr. Buddy Seay. Blue Cross wanted Baldwin to engage in "couples" therapy with Head "to mold and shape his behavior". Baldwin rejected that option. *Baldwin* at 1299.

On December 7, 2001, Tommy Hudgins, District Manager, met with Baldwin and informed her that her allegations were investigated and could not be corroborated. Hudgins then related that he supported his manager (Head) and that he could not have strife in the office. Hudgins then offered Baldwin a transfer to a position approximately ninety miles from Huntsville, Alabama where she would have to re-start her commissioned based sales career. Baldwin rejected transferring to a new location because she had successfully built a book of business and had family obligations. *Baldwin* at 1299.

On December 14, 2001, Baldwin was sent a letter from Rick King which stated as follows:

> We have suggested that you and Scott Head find a way to resolve the matters that have put a strain on

> this relationship and have offered assistance in this regard. However, you have insisted that you would not continue to work for Mr. Head and that it was our responsibility to resolve all issues you raised to your satisfaction. It was our clear understanding that you were not willing to assume any responsibility for the deterioration in your relationship with Mr. Head.

(*See* Pet. App. Pg. 57a)

Baldwin, already on suspension, did not resign and was terminated.

B. Procedural History

Baldwin, within 90 days after receipt of her right to sue letter, filed a lawsuit in the Northern District of Alabama. The District Court concluded that no actionable sexual harassment occurred. *See* App. p. 39a. In a footnote, the Court indicated that Blue Cross and Blue Shield of Alabama was entitled to an affirmative defense. App. p. 64a, f.n.14.

The Eleventh Circuit affirmed the judgment on the basis of the *Ellerth/Faragher* affirmative defense and declined to make a decision on the question of sexual harassment.

The Court did not find "the offer to transfer" or the request that Baldwin attend counseling with the alleged harasser as a tangible employment action. Thus, the *Ellerth/Faragher* affirmative defense was available.

Under the defense the employer avoids liability if "(1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or

corrective opportunities [it] provided." *Baldwin*, citing *Faragher*, 524 U.S. at 807, 118 S. Ct. 2293; *Ellerth* 524 U.S. at 765, 1118 S. Ct. 2270.

The Court of Appeals accepted the affirmative defense as a matter of law at the summary judgment stage because the company was not "required to do a full blown due process trial type proceeding in response to complaints of sexual harassment" and that Baldwin's refusal of counseling with her harasser "....is enough to carry the day for Blue Cross on the second element of *Faragher-Ellerth* defense." *Baldwin* at 1304, 1306.

The Court also determined that by waiting just over three months before making her complaint of sexual harassment, Baldwin waited too long. *Id.* at 1306, 1307.

REASONS FOR GRANTING THE WRIT

I. CONTEXT STILL MATTERS

Acknowledging that Title VII is not a civility code does not require a parallel concession that the statute is a license to leverage supervisory authority to request sex and demean the only female marketing representative in the office. There was no testimony in the record that Head, the alleged harasser and manager of the Huntsville office, requested sex from the male representatives. Emma Barclay, Blue Cross's, investigator understood that Baldwin's allegations included demands for sex.

As this Court makes clear in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 370 (1993) "Title VII comes into play before the harassing conduct leads to a nervous breakdown."

Other circuits have rejected the defense of "an equal opportunity harasser." *See Steiner v. Showboat Operating Company,* 25 F.3d 1459, 1463 (9th Cir. 1994) (supervisors consistent abuse of men and women is not a defense to sexual harassment claim); *Smith v. First National Bank* 202 F.3d 234, 242 (4th Cir. 2000) (rejecting arguments that plaintiff was not harassed due to gender because male and females complained about a supervisor's management style); *Brown v. Henderson,* 257 F.3d 246, 252-53, (2nd Cir. 2001) ("Discrimination cannot be cured or disproven solely by favorable, or equitable treatment of other employees of the same race or sex") (citing *Connecticut v. Teal*, 457 U.S. 440, 455, 125 S. Ct. 2525).

The Court's application of the Vince Lombardi rule of "He treats us all like dogs" and "what is true on the practice field is true in the work place" fails to give any weight to the context of the harassment. *Baldwin,* 480 F.3d 1287, 1301, f.n.1 (11th Cir. 2007).

In *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 82, 118 S. Ct. 998, 1003, (1998), the Court recognized that context matters.

> In same-sex harassment (as in all) harassment cases, that inquiry requires careful consideration of the social context in which the particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of the workplace behavior often depends on a constellation of

> surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

In 2006, this Court in examining "material adversity" for purposes of retaliation claims and citing *Oncale* re-emphasized that: "Context matters." *See Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405, 2415, (2006).

Baldwin worked for a nonprofit health insurance company. Baldwin was the only female marketing representative out of nine such persons. Baldwin was upset enough to risk her a job to file a complaint. Baldwin's complaints included objecting to routinely being addressed as "hey babe" and referred to as a "cocksucker" and a "peckerwood".[3] Prior to being suspended and terminated

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[3] In applying the severe or pervasive standard, the District Court rejected any possibility that "pecker wood" was a sexual epithet. "Pecker wood (1859) is U.S. Southern black dialectal inversion of woodpecker (q.v); in folklore, taken as the type of white folks (1929) and symbolically contrasted with blackbird", ruled the Court citing www.etymonline.com , an on-line dictionary. *See* Pet. App 45a f.n.6.

That on-line dictionary definition is found under the entry "Pecker." The Court skipped the definition portion which describes the word "pecker" as a slang word for a penis. Baldwin, originally

Baldwin continued working. A male marketing representative conceded that the Huntsville office was akin to a "boys club".

The fact that men were exposed to the same conduct without objection (absent the requests for sex) does not require Baldwin to accept such treatment. To do so would frustrate the intent of Title VII. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 806, 118 S. Ct. 2275, 2292 (1998) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372, 45 L. Ed. 2d 280 (1975)) ("Primary purpose of the statute is to influence conduct.").

In allowing the affirmative defense, the Court did not answer the question of whether the conduct alleged satisfied the "severe or pervasive standard" to establish a sexually hostile environment. However, Title VII should not be encouraging would be harassers to expand their target range to avoid liability.

II. TANGIBLE JOB ACTION PRESENT

After reporting harassment Baldwin was given the stark choice of participating in counseling to "mold and shape the behavior" of the alleged harasser or re-starting her largely commission-based career in a new city, resign or be terminated. The Eleventh Circuit held that an offer to transfer is only an offer to transfer and not a tangible job action. *Baldwin* at 1300.

When Baldwin declined psychological counseling with her supervisor/alleged harasser and declined to transfer to a

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from Connecticut, testified that she believed the term meant a man with a penis that was erected.

different city, she was terminated from employment. The Sixth Circuit has held that whether a transfer is an adverse employment action is a jury question. *See Keeton v. Flying J.*, 429 F.3d 259 (6th Cir. 2005) *hearing and rehearing en banc denied* (2006), *cert. denied*, 127 S. Ct. 109, 166 L. Ed. 2d 33 (2006) (To the extent an employee needed to consider relocation a transfer can be an adverse job action.).

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148, 124 S. Ct. 2342, 2355 (2004), this Court applied "*Ellerth/Faragher*" affirmative defenses to constructive discharge. The Court explained, "Unlike an actual termination which is always effected through an official act of the company, a constructive discharge need not be." When Baldwin rejected the transfer, an actual termination occurred. *See* Pet. App. pg. 66a.

As there were tangible job actions such as the proposed psychological counseling with the alleged harasser and Baldwin's suspension, and termination, Blue Cross should not be eligible for an affirmative defense.

III. THE DECISION BELOW APPLIES TOO STRICT A STANDARD

If there is no tangible job action – as the Court of Appeals held in this case – a defendant can avail itself of the affirmative defense by showing: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff/employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. *Citing Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 at 765, 118 S.Ct. 2257; *accord Faragher*, 524 U.S. at 807, 118 S. Ct. 2275." *Baldwin* at 1303.

In 2004 this Court addressed whether a constructive discharge amounted to a tangible job action and provided additional guidance to as to how the *Ellerth/Faragher* affirmative defense should be applied. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 152, 124 S. Ct. 2342, 2357, (2004).

> Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. See *supra*, at 2354. The plaintiff might elect to allege facts relevant to mitigation in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

As Blue Cross details in Baldwin's termination letter, she reported the harassment, failed to accept of blame for being harassed, rejected good faith efforts to resolve the matter (psychological counseling with the alleged harasser), and the transfer to a new city. *See* Pet. App. pg. 57a. Baldwin was left to choose between termination and resignation. Baldwin continued to work undeterred until placed on suspension.

A. Affirmative Defense Based on Avoidable Consequences Doctrine

The *Ellerth/Faragher* affirmative defense places the burden on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce the harm. *Pennsylvania State Police*, 542 U.S. 129, 146, 124 S. Ct. 2342, 2354 ("Both decisions (*Ellerth/Faragher*) place the burden squarely on the defendant that the plaintiff unreasonably failed to avoid or reduce the harm.").

The underpinnings of the *Ellerth/Faragher* affirmative defense stem from tort law – the avoidable consequences doctrine. That doctrine provides that victims have "to use such means as a reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." *Pennsylvania State Police,* 124 S. Ct. at 2354 (citing *Ellerth*, 524 U.S. at 765 and *Faragher*, 524 U.S. at 807).

In *Ellerth*, the Court explained, "Title VII borrows from tort law the avoidable consequences doctrine, see *Ford Motor Co. v. EEOC,* 458 U.S. 219, 232 n.15, 102 S. Ct. 3057, 3066 n.15, 73 L. Ed. 2d 721 (1982) and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances." *Ellerth* at 764.

Later in the *Pennsylvania State Police* decision this Court also cites C. McCormick, Law of Damages (1935) ("defendant has the burden of persuading the fact finder "plaintiff could reasonably have reduced his loss or avoided injurious consequences"). *Pennsylvania State Police,* 524 U.S. 129, 146, 124 S. Ct. 2342, 2354. Title VII was amended to provide for jury trials. *See* 42 U.S.C. §1981a(c). **Traditionally, the fact finder has been the jury.** *See Arbaugh v. Y&H Corporation*, 546 U.S. 500, 126 S. Ct. 1235, 1244 (2006) ("If satisfaction of an essential element of a claim for relief is at a issue, however, the jury is the proper trier of contested facts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).").

The avoidable consequences doctrine speaks to mitigation of damage issues after the establishment of liability. *See Ford Motor Company v. Dallas Power*, 499 F.2d 400, 415 (5th Cir. 1974) ("The doctrine of avoidable consequences is a recognition of the law's general policy that parties minimize

the damages through reasonable diligence. The doctrine merely goes to a reduction or allowance in damages to be awarded."); *Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171, 1175 (6th Cir. 1988) (The duty to mitigate damages arises after the Defendant's tortious conduct); *Williams v. Jader Fuel Company*, 944 F.2d 1388, 1401 (7th Cir. 1991) (The rule of avoidable consequences comes into play after the injury, citing W. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts); *Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989) ("Doctrine of avoidable consequences essentially a rule permitting apportionment of damages").

Unless there are no material factual disputes, applying the avoidable consequences doctrine as *Ellerth/Faragher* affirmative defense is a jury question.

What are the contours of a reasonable time frame to complain about harassment to the employer?

Courts have taken different approaches to this question. *See Watts v. Kroger Company*, 170 F.3d 505, 510 (5th Cir. 1999) (Reversing summary judgment on the affirmative action prong that the employee unreasonably failed to take advantage by waiting from three months from spring until summer to report harassment)[4]; *Homesley v. Freightliner*, 61 Fed. Appx 105 (4th Cir. 2003) (unpublished decision) ("Unquestionably it was a jury decision on the second part of the *Faragher/Ellerth* defense"); *but see Jackson v. County of Racine*, 474 F.3d 493, 502 (7th Cir. 2007) (Summary judgment appropriate on the affirmative defense because the investigation was thorough and resulted in discipline for the

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[4] Baldwin also waited over three months from the allegations of sexual harassment.

alleged harasser and complaining party waited four months after alleged harasser became a manager to make a complaint)[5].

Head was asked whether he received any discipline. He responded no. When asked whether Blue Cross ever suggested counseling to him, Head responded no.

Granting summary judgment establishes that Blue Cross proved their affirmative defense at the summary judgment stage and elevated the plaintiff's burden on opposing summary judgment to the level of a legal requirement.

CONCLUSION

Wherefore premises considered, Baldwin respectfully requests that this petition be accepted by the Supreme Court of the United States.

Respectfully Submitted,

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[5] Baldwin disputes the reasonableness of the investigation including the failure of Rick King, the decision maker, to interview her. *Baldwin* at 1304.